UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MASSACHUSETTS - BOSTON

IN THE MATTER OF:	.	Case #15-11362
	.	
DAMIAN ANKETELL	.	Boston, Massachusetts
	.	**March 30, 2016**
Debtor.	.	10:14:44 A.M.
SMITH, *et al.*,	.	
	.	
Plaintiffs,	.	
	.	
v.	.	AP #15-01124
	.	
ANKETELL,	.	
	.	
Defendant.	.	

TRANSCRIPT OF RESCHEDULED CLOSING ARGUMENTS
[#1] VERIFIED COMPLAINT BY TIMOTHY SMITH,
THERESA DIPIRO AGAINST DAMIAN ANKETELL PLAINTIFFS, *PRO SE*
BEFORE THE HONORABLE JUDGE FRANK J. BAILEY, J.U.S.B.C.

APPEARANCES:

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(At 10:14:44 a.m.)

THE CLERK: Okay. This is adversary proceeding 15-01124. This is Smith, et al v. Anketell. This is closing arguments.

Will the parties please state their names for the record?

MR. SMITH: Tim Smith, *pro se* plaintiff. I'm sorry. Tim Smith, *pro se* plaintiff.

MS. DIPIRO: Theresa DiPiro, *pro se* plaintiff.

THE COURT: Okay.

MR. REGAN: Good morning, Your Honor. John Regan representing the defendant Amian -- Damian Anketell, who is with me.

THE COURT: All right. Good morning, everyone. Okay. All right. So we're here for closing arguments. Let's see. And did we discuss time last time, how much time you'll have for this?

MS. DIPIRO: I don't believe we did. Ours is very short.

THE COURT: Okay. All right. And the way I normally would do this, I'm pretty sure we talked about this, is the burden is on the plaintiffs, so the burden is on you. And so I would allow you to go first and last. All right. So I'll allow you to make your arguments. I'll allow you to make your arguments as to what you say the evidence has shown and then we'll allow Mr. Anketell to make his closing argument and then I'll give you a very brief period to respond. Okay. So just another five minutes or something if you want to say something in response to what you heard him say or you may choose not to.

Okay. So do you think maybe 20 minutes will be enough for you to make your closing argument?

MR. SMITH: Yes.

THE COURT: You think that's enough?

MR. SMITH: Definitely.

THE COURT: Okay. All right. So I'm going to give you 20 minutes to get started. I will give Mr. Anketell and his counsel 25 minutes, and then you'll have five more minutes, okay? So we'll have a fair spread of time. Okay. Any other questions or preliminaries?

MR. REGAN: No questions, Your Honor.

THE COURT: Thank you.

MR. SMITH: No questions, Your Honor.

THE COURT: All right. So let's get started. Mary is going to time it.

Mary, do you have it set up on the -- yeah. So we have a light system and when that starts to blink red, it means your time is up.

Is there a warning, Mary, before that, do you know? Is there a yellow? All right. Don't worry about it. I'll keep an eye on the time.

MR. SMITH: We won't get close to it, I don't think.

THE COURT: It will -- oh, you'll be surprised. Okay. So you'll be able to tell how much time you have left from there. Okay?

MR. SMITH: Thank you. I also want to apologize for being late today.

THE COURT: I understand.

MR. SMITH: I do apologize.

THE COURT: Okay. Well, fortunately, I'm here so -- and didn't have things backed up until this afternoon, so okay. So let's get started then.

MR. SMITH: Okay. So I think I would just start by saying that --

THE COURT: I think you'd better get that microphone. Would you be uncomfortable arguing from there, from the podium?

MR. SMITH: No, that's fine.

THE COURT: You're going to be happier because that microphone is higher and it -- it's going to --

MR. SMITH: There wouldn't be water; that's important.

THE COURT: There is water, isn't there?

MR. SMITH: That's okay. I'll survive.

THE COURT: We have water. We'll find water. I know. Okay. We'll get him some water.

MR. SMITH: Okay.

THE COURT: That's great.

MR. SMITH: So I think our take-away is that a lot of evidence in these types of cases is circumstantial, not direct. And I think that with that being said, we have a strong line of witnesses that came forward, including ourselves, which would be five witnesses that told precisely the same story. Ours is a different story right there from the beginning. And I think that, you know, to begin with I would say that from our point of view there needs to be some capacity to forgive and understand what happened to us, if there was a sloppy business decision or if things just didn't work out correctly.

But, in our view, all of the evidence from the misrepresentations at the initial point of view, they point to a clear and systematic attempt to defraud us from the start. The misrepresentations were many and continued throughout the process. The initial meeting where I took some notes regarding the statements that were made to us and all the way up through the continued misrepresentations talking about the progress of the job and requests for additional funds, none of which turned out to be near the truth. And I think that's the basis of our case is the systematic misrepresentation.

And if you look back, like I said, you don't see a business that just steps on a few land mines and had to scramble quickly. There's an absolute insolvency, an insolvent business that was present that have no business being a going concern, and I think the evidence speaks to that rather plainly.

THE COURT: Let me ask you this way.

MR. SMITH: Yeah.

THE COURT: This is the focus for me --

MR. SMITH: Okay.

THE COURT: -- you know, in deciding this case. You say that the debtors -- I'm sorry. You are the debtors. You say that Mr. Anketell is not entitled to a discharge of your debt under -- without using -- we don't have to go through the statutes that way but --

MR. SMITH: Okay.

THE COURT: -- you say that he made certain misrepresentations to you.

MR. SMITH: Correct.

THE COURT: He lied to you in some way.

MR. SMITH: That's right.

THE COURT: All right. What were the misrepresentations --

MR. SMITH: Okay.

THE COURT: -- that have been proven?

MR. SMITH: Okay.

THE COURT: Not ones that you think about now, but ones that were proven at trial.

MR. SMITH: Okay.

THE COURT: That's what I need to hear about.

MR. SMITH: I think that based on the evidence presented proven would be the -- some of the original claims of 2.5 million in revenue from this business and the --

THE COURT: All right. So number one is he said to you --

MR. SMITH: Right.

THE COURT: -- what?

MR. SMITH: He explained to me that he had done 2.5 million dollars of business the prior year and that he had a host of other jobs lined up for the future. And based on the document produced and entered into evidence he had basically no jobs lined up. I believe it was something along the order of approximately $30,000 of jobs lined up. And I believe some of those might have been -- I'm positive they were -- they were actually Chris Lablanc's jobs as well.

THE COURT: All right. So number one is that he said two things. He said, "I did 2.5 million dollars of business in the past year and I have jobs lined up."

MR. SMITH: Right. Jobs lined up in the future and that was part of -- that compelled us to act. So what was made clear to us -- was presented to us was that if you want us to do the work, you'd better act quickly. We have a busy schedule, a pipeline of jobs and we can squeeze you in. And that definitely -- that put a bit of pressure on us. You know we had some talks about it. I was more on board than my wife and we ended up going forward and due to that representation we went forward with this project.

THE COURT: So let's keep making the list of misrepresentations.

MR. SMITH: Sure.

THE COURT: What else did he say that you say -- and this is what was proven; not what you think now but what was actually proven.

MR. SMITH: Right. Okay.

THE COURT: What other misrepresentation did he make to you?

MR. SMITH: Okay. All right. Another misrepresentation was that Mr. Anketell had done background checks on all of his employees and subcontractors.

THE COURT: Okay.

MR. SMITH: And this turned out to be false. That was testified to by Paul Lance and Chris LeBlanc who had not been subject to background checks. That's something they would have to have been contacted for, I believe. And with regard to necessary information and above and beyond that Home Advisory only does backgrounds on the applicant per their website.

THE COURT: All right. Now, so you say that he said, "And I do background checks on all my employees," and you say that at the time he said that --

MR. SMITH: This was --

THE COURT: It was not true?

MR. SMITH: It was not true and it helped us -- we have three young girls at home and that -- we weren't home around a lot of the time and we'd be home most likely when they were there, but just in case it was good to know that these people had been vetted.

THE COURT: How did that impact you? How were you injured by -- if -- let's assume for the moment that that's what he said.

MR. SMITH: Right.

THE COURT: And it wasn't true.

MR. SMITH: Yeah.

THE COURT: How were you injured by that?

MR. SMITH: We were injured -- that compelled us. It was one of the reasons we went forward with this entire project. It was especially important to my wife. I thought it was important, too, so in my opinion that speaks to the entire injury of what happened to us, the loss and all that because that helped -- that was a -- a -- one of the primary reasons that we went forward. We liked that attitude, that safety was prime concern.

THE COURT: But I'm looking for very specific answer to this now.

MR. SMITH: Right.

THE COURT: Because the statute is going to require you to have that answer the way it’s interpreted. Was there something that happened with an employee that’s -- that -- on whom a check was not made that injured you?

MR. SMITH: There is not. No, that’s not the case.

THE COURT: All right. So you have -- it’s a more generalized idea you have here that you proceeded with him. You relied on that statement and proceeded with him, but the truth or not of that specific statement didn’t matter?

MR. SMITH: It mattered in that it was going reason -- it was the primary reason for us to continue and the ultimate injury occurred because of his misrepresentations. Had we known there were misrepresentations, we wouldn’t have gone forward. We wouldn’t have been injured the way we were. That’s how I present that, but --

THE COURT: All right.

MR. SMITH: You’re asking me if there was specific injury from someone who wasn’t vetted and the answer to that is no. No --

THE COURT: Okay. We can go back --

MR. SMITH: -- trouble with --

THE COURT: -- and we will. Any other misrepresentations or lies that he -- you say he told you?

MR. SMITH: One of them was the fact that the job was moving along quickly and that he needed I believe it was another payment to move forward. And the fact that there were clearly no funds left for the bank accounts, there were no funds left, so there was no way that the job was going anywhere. And I think that was a clear misrepresentation.

THE COURT: I'm sorry. Now I'm confused.

MR. SMITH: Okay.

THE COURT: What was this misrepresentation?

MR. SMITH: That the job was going further and faster than he anticipated --

THE COURT: All right.

MR. SMITH: -- therefore, he needed additional funds in order to keep the ball rolling and further bank accounts. There were no funds at all to keep things going. The job wasn't moving any faster than it had been before and that was quite plain.

THE COURT: All right. So you're -- the misstatement is that the job was "moving along more quickly than we anticipated," and you say that -- I didn't ask you this, but you've now added that the -- but that you know that wasn't true because he didn't have sufficient money to --

MR. SMITH: To get anything moving. The project had basically stopped.

THE COURT: But couldn't it have still been moving along faster than anticipated but -- how does the fact that there wasn't money available for him to continue --

MR. SMITH: No.

THE COURT: -- establish that it was --

MR. SMITH: Right.

THE COURT: -- untruthful when he said, "We're moving along faster than expected"?

MR. SMITH: I think the answer to that is simply that it's up to them then.

THE COURT: I have to write an opinion on this, so I have to nail it down.

MR. SMITH: Yeah.

THE COURT: You can't tell me --

MR. SMITH: I understand.

THE COURT: -- I can't write it. I can't find it.

MR. SMITH: Yeah.

THE COURT: Go ahead. You can talk to your wife.

MR. SMITH: Yeah. I might have my wife actually continue it. She just hasn't been -- if that's possible. I know you don't like the juggling.

THE COURT: It's okay.

MR. SMITH: Okay.

THE COURT: You're just going to have your 20 minutes, so --

MR. SMITH: Yeah, okay.

THE COURT: -- you want to get going.

MS. DIPIRO: Thank you, Your Honor.

THE COURT: Sure.

MS. DIPIRO: In the month of March, which was well close to the end of the project, which was April 3rd, he told me that he -- his -- the project was moving around -- along faster than expected and that they were going to do -- they were going to finish the project in eight weeks instead of ten.

His bank account balance in Ground Up Construction was minimal, so that's one concern. And right after that statement I gave him a significant amount of funds. And it was clear at that time that he was bouncing checks as Paul Lance's check for $7,000 was -- came back with insufficient funds. I wasn't aware of it at the time. So the damage to us is that we proceeded to give him funds in a project that was clearly not going to finish because he didn't have the funds to even pay the framers.

THE COURT: All right. So what you're saying is that his making the statement to you what you say was untrue that it was moving along more quickly than expected and that it would be done in eight weeks and not ten was that you wrote him another check?

MS. DIPIRO: We -- exactly.

THE COURT: How much?

MS. DIPIRO: That check was for -- I think it was $11,000.

THE COURT: Okay. All right. Any other -- I have three misrepresentations on my pad.

MS. DIPIRO: Okay. Yeah.

THE COURT: Any others?

MS. DIPIRO: He also said during that time in March that his -- Chris LeBlanc was out doing background checks on all his subs and through Chris LeBlanc's testimony he said he never was asked to do background checks on any of the subs nor was he -- nor was a background check on himself done. And I'll go back to when Tim spoke about in the beginning when we first met with him he said that he -- he claimed that he does everything regarding safety and he does background checks on all his employees.

THE COURT: All right. So this is a different statement from him.

MS. DIPIRO: Yeah, that's different. I just -- yes. Yeah. Okay.

THE COURT: That was already said.

MS. DIPIRO: Yes.

THE COURT: So now you're saying that after he started --

MS. DIPIRO: Yeah.

THE COURT: -- later on --

MS. DIPIRO: Yeah.

THE COURT: -- he then repeated this -- he used the words that Chris LeBlanc was doing background checks on all the subs.

MS. DIPIRO: Yep.

THE COURT: And you -- and that was not true?

MS. DIPIRO: Correct.

THE COURT: And we know that because why, because Mr. LeBlanc said he wasn't doing that?

MS. DIPIRO: Because he testified that he never did background checks.

THE COURT: All right. And how were you injured by -- let's just assume for the moment that statement was untrue.

MS. DIPIRO: Um-hum.

THE COURT: And let's assume he said it.

MS. DIPIRO: Yep.

THE COURT: How are you hurt by that?

MS. DIPIRO: Financially.

THE COURT: No, I understand that, but how financially?

MS. DIPIRO: We gave him additional funds and --

THE COURT: So you're back to the $11,000?

MS. DIPIRO: The $11,000. At that point it was $77,000 that he maybe spent 28 of it.

THE COURT: Well, some of it you gave him before he made that statement.

MS. DIPIRO: Yes.

THE COURT: You can't have --

MS. DIPIRO: Yes, yes, $11,000.

THE COURT: It can't have been an inducement --

MS. DIPIRO: Yep.

THE COURT: -- for you to do anything that had already happened.

MS. DIPIRO: Yeah, okay, gotcha. No, it was $11,000 and that was for -- to continue the work and it was clear within days after that they called -- they stopped the job and they said -- they told -- they told us that they're going to meet with us on Friday.

THE COURT: Okay.

MS. DIPIRO: Which was forthright, so --

THE COURT: I remember that, too, but -- all right. That's four. Any other false statements that you're relying on in your case?

MS. DIPIRO: Oh, yeah. He also when -- in the month of October when we gave our first -- after we gave our first deposit of $38,000 we became wary of Mr. Anketell because he was -- we could not get in touch with him. And my husband contacted him and he said that -- and asked him and I believe that it was while Tim was at work and he asked him if he -- if he can get -- if we can get our deposits back. And he said, "I can't do that," and he also stated that he had started buying materials for the project.

And I -- and we found that false in that we spoke to -- we actually have receipts from when he wrote out the check to the architect and that was not in the month of October. It was 23 -- it was Exhibit H. And he also said that he spent money on materials. If you go over his use of funds spreadsheet, which was Exhibit -- trying to find the exhibit number -- Exhibit J, the trial, there were no expenditures of materials in the month of October. So the damage there is that we continued -- we felt like he was already starting a project and we couldn't get our deposits back.

THE COURT: So it wasn't that he said, "Well, we have a contract and it's not subject to cancellation" --

MS. DIPIRO: He did say that as well. He said, "We're in a contract together."

THE COURT: But that was a statement of law, not of fact.

MS. DIPIRO: Yeah, that was -- he did state that.

THE COURT: All right.

MS. DIPIRO: He did say --

THE COURT: But in addition he said, "But by the way, I don't have -- I don't have the $38,000 or" --

MS. DIPIRO: He said, "I" --

THE COURT: -- "I spent it on materials."

MS. DIPIRO: He said, "I started buying materials and I paid for the architect," and we noticed that the check -- the architect wasn't done until November and there was no materials purchased in October and that's on the use of funds spreadsheet.

THE COURT: Okay. All right. Anything else that -- any other misrepresentations that you said he made?

MS. DIPIRO: I'm just adding to what my husband said about the jobs lined up in the future.

THE COURT: Yeah.

MS. DIPIRO: When we met with him he told us that there were jobs -- he had multiple jobs lined up in the future and that we had to sign the contract and commit with the funds so we can get into his schedule. And it was clear by testimony of Chris LeBlanc that in the -- certainly in the year of 2015 that there were no projects besides shoveling that was going on with him and Anketell.

THE COURT: Okay.

MS. DIPIRO: And Ground Up Construction.

THE COURT: All right. Okay. So that's sort of your (a)(2)(A) -- 523(a)(2)(A) theory, right?

MS. DIPIRO: Yes.

THE COURT: That's everything there. And --

MS. DIPIRO: One other thing I wanted to mention is he -- as far as the deposit scheme given in February, I don't think I realized this until after the trial, but his building permit wasn't taken out until March and he claims that he started demolition in February. So I just wanted to note that the bill didn't permit -- that was -- admitted as an exhibit wasn't taken out until March.

THE COURT: Okay.

MS. DIPIRO: And I believe we testified that construction began in March. So those deposits that were given in February, they were -- they could -- it was for demolition. It hadn't started until a much -- a month later.

THE COURT: Okay. I think you say that he also violated 523(a)(4), which is for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny. Do you say that? Is that one of your theories?

MS. DIPIRO: Yes.

THE COURT: All right. Tell me what evidence there is of that now that you've had the trial.

MS. DIPIRO: Well, he admitted in trial that he took funds from deposit and deposited into his and his wife's joint bank accounts. He also --

THE COURT: I'm sorry. So he took your deposits, money that you gave him --

MS. DIPIRO: Yes.

THE COURT: -- for your project and he deposited it in his personal accounts?

MS. DIPIRO: Yes, he stated it was joint with his wife.

THE COURT: Why was that wrong?

MS. DIPIRO: Because the funds were supposed to be used for our project.

THE COURT: Is he entitled to be paid for his work, though?

MS. DIPIRO: He shows that he has payroll. There's a lot of withdraws that just say Damian Anketell with no payroll. He actually has a payroll service that has his name on it. I mean, he testified that he does use a payroll service. I'm not sure why he would have paid himself a personal check -- a company check. He also stated that his wife has loans -- that his wife had given him loans and his -- and then he testified that he does not have such loan documents, so we're unsure why those monies were given to her.

THE COURT: Okay. All right. So the way that fits into (a)(4) is you say that he had possession of your money and he either embezzled it or stole it, larceny, by diverting those funds to himself and not to your project.

MS. DIPIRO: Yes.

THE COURT: And where is it -- is there some writing or something you're relying on to say that the money that you gave him could only be used for your project? Why do you say that? Money is fungible.

MS. DIPIRO: Yeah. Well, I certainly don't think it should go to his personal accounts. I would think if it went to business's --

THE COURT: Well, that's your opinion, but I'm asking what --

MS. DIPIRO: What -- well, he has --

THE COURT: This is a court of law, so I'm trying to figure out --

MS. DIPIRO: Yeah, okay.

THE COURT: -- what basis you have to say that the money he gave you could only be used for that -- for your project. What legal reason do you have? Did he say somewhere in writing --

MS. DIPIRO: Oh, in the contract it states --

THE COURT: Where?

MS. DIPIRO: -- what the deposits are being used for. It was --

THE COURT: Does it say that?

MS. DIPIRO: -- Exhibit A.

THE COURT: Where? What exhibit is the contract?

MS. DIPIRO: It's Exhibit A.

THE COURT: All right. And where in the contract does it says he promises to use --

MS. DIPIRO: Oh, it doesn't say it promises, but it says --

THE COURT: Well, whatever. Words from --

MS. DIPIRO: -- what -- where the funds are going to be used.

THE COURT: -- which one can infer a promise.

MS. DIPIRO: He breaks down each payment into sub-categories, demolition of chimney, $742; dumpster, recycling fees --

THE COURT: I see that, but that doesn't -- how does that meet -- why should I find that that means he could only use your deposit to accomplish those tasks? What if he used other money that he had? You didn't really care, did you, if he used other money, but did that work?

MS. DIPIRO: It was clear that he didn't have funds after the fact, but in here it just said all work is guaranteed for one year from completion.

THE COURT: Well, that's different, too, isn't it? It's different from saying he could only use the money that you gave him for your project.

MS. DIPIRO: Yeah, it doesn't say specifically that you have to use my funds for my project.

THE COURT: All right. So it wouldn't be in the contract, so then it's that -- did he say it to you?

MS. DIPIRO: Did he say it?

THE COURT: Did -- and by the way, I'm not asking you now to testify. Was there testimony at trial that he said something like that to you?

MS. DIPIRO: Well, he said that the $38,000, that he used the money to buy materials, so --

THE COURT: Okay.

MS. DIPIRO: And it was, in fact, not used to buy materials and it wasn't used at that time for the architect, so where did the money go? It was disbursed elsewhere.

THE COURT: All right.

MS. DIPIRO: So he did tell us that some of the materials were purchased with our money.

THE COURT: Okay. All right. Well, your time is up --

MS. DIPIRO: Okay.

THE COURT: -- you know, here. I'm going to give you a chance to respond --

MS. DIPIRO: Sure.

THE COURT: -- you know, to what he says, okay?

MS. DIPIRO: Thank you, Your Honor.

THE COURT: All right.

MR. REGAN: In the evidence at trial, first of all, did not include any testimony or documents concerning condition of Mr. Anketell, financial condition or otherwise, prior to at the time of the formation of the contract. Specifically, there's no written statement of financial condition. Therefore, there is no evidence upon which to base any claim of misrepresentation concerning the condition of the company.

THE COURT: Well, sure there is. They said it.

That's evidence.

MR. REGAN: There's no testimony, I'd respectfully submit, Your Honor --

THE COURT: Yeah.

MR. REGAN: -- to the effect that Damian said the financial condition of the company is vexed (phonetic). He did make statements, which he testified to at trial as well, concerning the volume of business he had done in the last period of time and the number of jobs he had on the books.

THE COURT: I see. Yes. You're right about that.

MR. REGAN: He said -- but the financial statement, spreadsheet, balance sheet of the company was never represented in any testimony you heard at trial --

THE COURT: I don't think they -- you're right. I don't think they're alleging that either.

MR. REGAN: I agree, but just categorically the written statement is one specific category --

THE COURT: Okay. All right.

MR. REGAN: -- as you know, under the statute.

THE COURT: Yeah.

MR. REGAN: And that's simply excluded here because there was none such presented.

Secondly, Mr. Anketell testified at trial credibly concerning the amount of business he had done in the past year or so.

THE COURT: Yeah.

MR. REGAN: And the number of jobs he had on the boards. First, I suggest the testimony is credible; secondly, this court knows in each one of these alleged misrepresentations there's certain elements that have to be proven to show an actual misrepresentation, the first one of which is that it is false. There must be evidence the statement was untrue.

THE COURT: Um-hum.

MR. REGAN: The only evidence presented at trial was the reference in Mr. Smith's note to the effect that a then departed employee had said he had only worked in some smaller jobs, not some bigger jobs. It doesn't falsify Mr. Anketell's statement to the effect that he'd done two and a half million-dollars' worth of work in the past year or so, nor does it falsify his claim that there are whatever jobs waiting to go.

Therefore, at that point I would say that that alone -- that the allegations of misrepresentations on those two points fails. There's no showing of his falsehood.

THE COURT: So didn't Mr. LeBlanc testify that he --

MR. REGAN: He did not. Mr. LeBlanc was not -- had no business with -- you'll -- if you -- what I recall his testimony, Your Honor, is that --

THE COURT: Yeah.

MR. REGAN: -- this is the first and only job he and

Mr. Anketell had ever done together.

THE COURT: I do remember that.

MR. REGAN: And so he certainly is not -- so he did not make -- he did not offer any testimony concerning history of business and revenues, nor the number of jobs on the boards of Mr. Anketell.

THE COURT: All right. The record is what it is. I don't recall one way or the other, but --

MR. REGAN: I think that's --

THE COURT: -- remind me then. So you say that Mr. Smith testified that a former employee told him that Mr. Anketell hadn't done --

MR. REGAN: That's the only thing I recall in the evidence that would even address this point. And this was a man who was a framer involved early on in the estimating of the job.

THE COURT: What's that guy's name? Do you remember?

MR. REGAN: Do you know?

Kenny LaFrancois (phonetic) and he left Mr. Anketell's employ before this job was actively underway, plus this job was underway. And again, you may recall that Mr. Smith offered his notes that he kept on his computer and they included the reference to Kenny having said, "I've only done small jobs."

THE COURT: I remember.

MR. REGAN: But again, logically that simply doesn't falsify the statements that Mr. Anketell made and he's not backing off on any of those statements. Mr. Smith said he said them; he told the Court he said them during his testimony as well. That testimony is unrebutted at this point, Your Honor.

THE COURT: Um-hum, um-hum.

MR. REGAN: With respect to the question of background checks, again you heard Mr. Anketell's testimony on that matter that the company who's giving him referrals, background checks and he does background checks of his own. The plaintiffs did not offer any evidence to falsify it. They only said that LeBlanc is not aware of it. That doesn't falsify the testimony.

And more importantly, as you go out doing the plaintiff's closing, one of the essential elements in a fraud claim is there must be reliance. First, the statement has to be false and I suggest this has not been -- this statement has not been falsified. And among other elements the plaintiffs must have relied upon it to the peculiar detriment and they told you that there was no mad outcome from an unscreened employee.

THE COURT: Well, what they say is that they hired him on the basis of that false statement. I know you contest that it's false, but they say it's false and there's evidence that it's false that Mr. LeBlanc or somebody said, no, they don't do that and Home Away doesn't do it. And so they say that that wasn't true. And then they say, yeah, no, nothing specifically happened as a result of not doing background checks, but it made us feel comfortable hiring them and it wasn't true, so we hired them and we got burned. That's what they're saying.

MR. REGAN: I understand, Your Honor, and I would simply suggest that that is a bit too attenuate when you look at the logical import of a claim, I do background checks; no, you didn't do background checks.

What logically flows from that sort of misrepresentation? A bad guy does something wrong in your house, does something wrong to your family. If you have an admission that didn't happen, if this is all part of the reason to enter into the contract, I suggest that's, number one, hasn't been falsified and, number two, it's a bit remote for that particular representation and the elements that are required to prove it as a misrepresentation.

They maintain that the statement of the job is moving more quickly is false. That hasn't been falsified. That is Mr. Anketell saying, it looks to me like the job is moving more quickly. Another one of the elements, of course, in a misrepresentation claim is that the statement had to be false and that the person making the statement knew it was false and intended a detrimental alliance. Mr. Anketell testified and actually Ms. DiPiro also testified that when Lance came in and started doing his framing things moved along beautifully. Everybody thought it was going faster. And Mr. Anketell came along and said, "Yeah, I think it's going faster, too. I think we're going to be able to beat that ten-week mark." That statement hasn't been falsified, Your Honor.

I'd also like to point out that all of the statements we're dealing with here was any claim of loss has to be analyzed before and after the contract was entered. The statements concerning the volume of business, the number of jobs on the boards, and doing background checks or not appear in the testimony to be pre-contracts. And if they are false and if they induced the contract arguably they're actionable. For the reasons I've suggested, I don't think any of those have been falsified.

Once you are into the contract, the contract spells out certain payments at certain points. All of the contract -- all of the payments that you've seen referred to in this action are payments on the contract. There are no special assessments. There are no forward a little bit more here for this event.

I would point out particularly with respect to the demolition payment. Chris LeBlanc testified that the demolition was completed early February -- by the end of February, interior demolition. There is a -- there's an adjective that we need to clarify what plaintiff is saying about the start of demolition. Exterior demolition was started with Lance entering the picture to do the framing. The interior demolition was done prior to that. The contract says with the beginning of demolition the payment is due.

When I -- I believe, if I remember the testimony correctly, when I asked Ms. DiPiro the question about when interior demolition began, I recall that she did not recall. She did not have that information in her head. Mr. LeBlanc did and it was his testimony that demolition was a February job completely consistent with the request for the demolition payment.

Further point on a couple of these alleged misrepresentations, particularly the demolition and the job is moving faster. As a general rule a misrepresentation in order to be actionable has to be a statement of present fact, not just a prediction, "I think this is going to happen in the future." The demolition payment was accompanied by a statement, "We're going to start demolition next week. We're going to save you pay." They paid in part, not entirely. Lance does a good job on framing. He says, "This is going well." And by the way, that's just a question of opinion as well, which is also not actionable as a misrepresentation. "This is going well. I think we'll be done in eight weeks instead of ten." Forward-looking.

The only thing it's a statement of whether the person believed that at that time or not. It's not something that can be verified or falsified as a present fact other than the state of mind that the person who's making the statement. And you've heard Mr. Anketell testify -- I suggest credibly -- that that was exactly what he observed and exactly what he believed and what he communicated.

You also heard his testimony to the effect that -- well, excuse me. Mist -- just a moment ago in the closing Ms. DiPiro suggested that there was a conversation in which -- in October where they asked for the deposit back. I will submit for the Court's -- your own memory and notes, my memory of the testimony was that Mr. Smith admitted he never did request the deposit back. He never did ask to get out of the contract. He started to have some cold feet, starting to wonder what they should do, but he testified, "I never said give me back my money, I never said let's cancel this contract."

Once you enter into contract, all the payments and all of the events that you've heard testimony of flowed naturally as part of that contract. And although it's not directly a point here, if you look at the performance under that contract it was the plaintiffs who failed to perform, who failed to make payments due when due.

Just going back to the very beginning of your questions to the plaintiffs, Your Honor, on the matter of segregation of funds it certainly would appear in the evidence that the funds were not segregated, held in escrow for this job alone. Also, there was absolutely no evidence to the effect that there was a request, a discussion and certainly not any agreement to the effect that the funds would be so segregated.

Absent such an agreement, there was no obligation on the part of Mr. Anketell to segregate them. It was his obligation to perform. So I'll keep you subject to liability on the contract if he failed.

THE COURT: Wouldn't there be an equitable trust of some sort that would arise where a person hands someone thousands of dollars for this project, a constructive trust, an equitable trust of some -- of some nature?

MR. REGAN: I don't believe that's the case, Your Honor. An equitable trust is a remedy super-imposed after something goes wrong. At the time the contract is entered into it would not be my understanding of the law of contract law that that's sort of a trust arises. The obligations and the liability to perform are certainly there without restraint, but the obligation, as you pointed out and I think I've argued prior to that prior in this case, money is fungible. This equitable trust -- it can be done. The contract is who saying they're going to freeze this. This is your bucket of money. This is the escrow. It goes with this job. There was none such. None such asked for nor agreed to in this case. The obligations was brought him -- Mr. Anketell to the point he's at now with all the attendant difficulties, but the obligation to segregate, I submit, is not there.

Also, on the question of the willful and malicious injury which was alleged, I would submit you've heard pretty much no evidence at all to support that claim. There was no evidence of physical, mental and emotional injury other than the stress that goes with any home rehab job and certainly the stress that goes with the job that goes awry, but there's no -- you don't hear evidence of any symptoms, you don't hear evidence of any diagnosis by any healthcare provider, you didn't hear any evidence of any treatment or consequences. So they failed to prove the existence of such an injury and they certainly did not present any evidence that would warrant a finding of malice on the part of Mr. Anketell. His testimony, I would suggest, was quite clear. He felt terrible. The affairs got to this state and he was in the process of trying to find additional capital to carry this through when he was served with a civil action. So he -- again, there is a complete failure of proof here on the question of willful and malicious injury.

THE COURT: All right.

MR. REGAN: And I believe that that is -- probably covers my points, Your Honor. The Court has the evidence.

This is what we believe it has shown. We respectfully refer you to our request for findings and rulings. Thank you, Your Honor.

THE COURT: Thank you, counsel.

Any rebuttal?

MR. SMITH: If it's okay, I may speak very quickly and then my wife will finish up, Your Honor.

THE COURT: All right. Five minutes.

MR. SMITH: Okay.

THE COURT: Okay.

MR. SMITH: Thank you. I'm just going to speak on the 523(a)(2) which is the false pretenses, false -- misrepresentations and actual fraud. And I think that can be got to very easily. We entered this contract because we were lied to, simply lied to. Witnesses that came forth were lied to as well. Chris LeBlanc explained how he was lied to. Paul Lance had bad checks written to him. Myself and Theresa explained we were lied to.

The evidence here is, like I said, it seems --

THE COURT: Well, how does the fact that even if it's true --

MR. SMITH: Yeah.

THE COURT: -- even if it was established that the debtor made false statements to others, how does that --

MR. SMITH: I think that goes towards his credibility, Your Honor, and the fact that every witness we called forth told the same story, systematic lying, bad checks written out. And I think it comes to who do you believe, who is the credible story.

THE COURT: Okay.

MR. SMITH: And I think we have the credible story. We have witnesses that came forth with nothing to gain, just to tell the truth and I think they came forward. They told the truth. Chris LeBlanc explained in detail how he was lied to. Paul Lance lost about $9,000. He was written a bad check. Is that a lie? Technically, no, but it's thievery basically is what it is. He's out the money; we're out the money. We've presented all this evidence and that's the credibility factor that we're putting forth. These misrepresentations made to us forced us into this contract which hurt us. These were the lies told to us that made us -- that coerced us into entering into this contract. Mr. Anketell had reason to do that. He needed money quick and he got it. He put his lure out, he lured us in, and that's what happened. He got his money. The money was spent immediately; $38,000 we put in there was gone before any materials were bought. Where did it go? The one piece of evidence that would have really made this I think a strong case for non-dischargeability was receipts. We spent them all on your job.

No, I guess the money is fungible. There's an expectation that our money is going to be used for our job. Whether the law states that or not, I don't know. That's the expectation and that's any business expectation, in my opinion, for what that's worth.

And that $38,000 was not spent -- was gone the first two weeks, I believe, three weeks with no materials being purchased. And I look at that and I say, where did it go? Where are the receipts that would show that? If there are receipts presented that show, oh, you bought this, this and that, that would be a different story, there would be I think credible cause for non-dischargeability because it shows he went and --

THE COURT: Did you testify that you called Mr. Anketell and said, "I want to cancel the contract" --

MR. SMITH: I sure did. I --

THE COURT: -- "same with the $38,000" --

MR. SMITH: I sure did say that, so I wanted to make --

THE COURT: I'm sorry?

MR. SMITH: I did testify that during the trial I did call him. I remember exactly where I said, "We're not comfortable. We want our money back" and Mr. Anketell said, "Well, I've already bought materials and bring (phonetic) the contract." So that did happen. I did ask for our money back. So that being said, I'll turn it over to my wife. Thank you, Your Honor.

MS. DIPIRO: Regarding the financial condition, I think the first thing that he mentioned, before signing the contract when we gave our -- him the $38,000 to deposit if you look at the bank statement submitted as an exhibit the balance in the Ground Up Construction account was $960, so that speaks to the financial condition of the company.

THE COURT: But counsel makes the point he never -- you haven't told me that he -- that Mr. Anketell told you that his company was in a fine financial condition or anything about his financial condition of his company.

MS. DIPIRO: He said he did two and a half million dollars' worth of sales and --

THE COURT: That's --

MS. DIPIRO: Which --

THE COURT: You might infer from that --

MS. DIPIRO: I inferred. That would be correct. I inferred --

THE COURT: We deal in statements here.

MS. DIPIRO: Yeah. Okay.

THE COURT: You know, so that might have been a fair inference; it might have been an unfair inference. You know, I don't know the answer to that, but first I have to believe that he made the statement and that it was false, so --

MS. DIPIRO: Yes. Well, I do -- don't believe his records show that he made two -- anywhere that we've received from him showed two and a half million dollars of income for Castle Hill and those statements, as well as the Ground Up were submitted for -- since we started the project. So all those statements from Ground Up, Castle Hill were in -- were -- are in there -- are in the exhibits.

THE COURT: Okay.

MS. DIPIRO: And he mentions Chris LeBlanc's testimony regarding the status of his projects. He -- Damian Anketell actually testified that he was a partner and I remember Tim questioning him saying, like, how -- was he -- is your company -- does he have mes -- I don't remember the legal term of it.

What's the legal term of partner?

A shareholder. And he said, "Oh, yeah, he's a partner." So they testified that he was a big piece of the company. Well, why wouldn't he know he had projects going on in 2015?

As far as background checks, I think we've really proved that was false and that he told me in March right before the project end that he -- Chris LeBlanc was out doing background checks on the subs coming in. And Chris testified that that was not happening. And that's just clear in my mind that it was an outright lie.

And then his comment on the -- about it moving along quickly and that Damian should -- you know, thought it did because the framer was moving along quickly, I wasn't told or Tim wasn't told that he was not receiving funds. And if you remember, Chris -- Paul Lance testified that the reason why he came back after that check bounced was because he didn't want to be sitting in this courtroom where Damian is today because he was doing what was right. And he actually told me after the project ended in April that he came back because he didn't want to leave us with an open move and the scary thing is that Damian Anketell if he was an honest man we would have been left with a hole in our home.

So that's -- so that testimony about he as an owner when I gave that $11,000 balance to him, he had a Ground Up Construction balance of $13,000 that's in evidence -- a negative $13,000 in Ground Up, zero in Castle Hill. So if he didn't -- if he thought his project was going to happen in six to eight weeks -- eight to ten -- eight weeks instead of ten, he is in complete uncontrol of his business because he had a 13 -- negative $13,000 balance when he received my $11,000. It was clear that couldn't happen. And that exhibit is in the bank statements if you look at the date that I made that payment.

THE COURT: Um-hum.

MS. DIPIRO: And regarding the volume of this business he says there is no special assessments. It was I guess in hindsight we should have noticed that we were like adding little things and he was just blanketly not saying, oh, that will be $5,000; I wanted to add some trim and it sort of got washed under the boards. And I think it was because his goal was not to finish the project. It was just, how do I get these funds in as fast as possible.

So the volume of the business and having no special assessments doesn't make any -- doesn't help.

THE COURT: Um-hum.

MS. DIPIRO: And I just want to make a statement that Chris LeBlanc did not state that the demo was completed in February.

And I do want to just notice that an exhibit entered of the building permit. The building permit was taken out by Damian Anketell on March 6th. And I did not state that I did not know. I said it was done in March. The demo started in March. I didn't know the exact date. So I know Chris LeBlanc did not say February because the demo did not start in February. And I only gave a partial payment of that demo payment and that's the reason why I didn't give the second payment because it never started. And then I think -- and then I gave the second payment, the $6200, once it started which is -- was in March.

And just regarding -- I don't know if -- Paul Lance and his framing, I know he said -- his attorney -- Attorney

Regan said that, you know, Lance said the job was going along great and everyone thought it was going along great, we weren't in his shoes where we were not receiving payment on work being done. So as an owner of a company he clearly knew that he was bouncing checks to people and he clearly knew that his balance was negative $13,000. Paul Lance's work was good because he's a good framer and he unfortunately got money stolen from him as well because he's owed money.

But he -- Paul Lance chose to not tell us as homeowners and, you know, that was his decision because he was working with Damian and -- and Chris LeBlanc and we didn't know that situation until April 3rd, but it's clear to me that Damian knew his financial status when he made those statements to me.

THE COURT: And you say he had a duty to tell you his financial status?

MS. DIPIRO: No, he didn't have the duty to tell me, but he lied when he said that the job is going to be completed in eight weeks instead of ten and he had a negative $13,000 balance in his account. He was getting $11,000 from me. How could it possibly be completed?

THE COURT: I see. So you're saying that --

MS. DIPIRO: You know, yeah, yeah.

THE COURT: So the falsehood here was in that he couldn't perform.

MS. DIPIRO: He couldn't perform because he had no money. He had no money. He was in the negative balance and he was desperate. Desperate. And we do refer to a Paul on -- after March 25th where he called us in the middle of the night -- we were in bed -- and asked for more money and we're like "We paid you everything we had to" and he said, "I -- this job is not going to be affected by my liquidity." He said he had a liquidity issue. And this was after all our payments had been made. So he was clearly, clearly concerned about his liquidity.

And regarding my husband's request for deposits back, he -- I was unsure. I know that he asked for it back, but I didn't think I asked for it. It was my husband asked for it when he was at work. He called him from his office and asked for the deposits back, so that did, in fact, happen.

And as far as the contract, I mean, it's just pretty clear. We made -- we didn't make payments from the contract. It's a really sad excuse for why this project didn't happen as we paid our framing -- we paid our demolition payment early. When we left the job he had $78,000 on hand and that's his -- that's his only defense. He had a building permit, so he's saying he did demolition in February and he didn't take the building permit out until 3/6 -- March 6th. That right there proves to me if you're a legal contractor that you probably want that building permit before you start ripping off somebody's roof because somebody might raise an eyebrow. And also, he --

THE COURT: Well, let me just ask you to summarize --

MS. DIPIRO: Sure.

THE COURT: -- your very last point now.

MS. DIPIRO: So that's pretty much it.

THE COURT: Okay.

MS. DIPIRO: I just went through the fact that he has.

And just one last -- regarding the willful and malicious injury, our home was left with no heat, no windows, CO detectors, CO cut off in our living space venting into our home. We had no smoke detectors on the second and third floor, no CO detectors, no windows, and it was in the middle of winter. Our kids and ourselves slept in sleeping bags for a month and so as far as malicious injury I really do feel like he could have considered that condition might be a painful existence of a family, how it was left.

THE COURT: Okay. And that was all testified to at trial?

MS. DIPIRO: That -- yeah, I said the status -- I showed the pictures of the home with the CO -- I showed pictures of the home and I mentioned all those items.

THE COURT: So that was at trial.

MS. DIPIRO: Yep.

THE COURT: Okay. All right. And so that's what you say was the --

MS. DIPIRO: Willingful (phonetic) and malicious injury.

THE COURT: Willful and malicious injury. But didn't you fire him?

MS. DIPIRO: No. We never fired him. He -- the last meeting with -- and I --

THE COURT: Chris LeBlanc was there, right?

MS. DIPIRO: He was there, yep. And he walked out and said he was going to need -- and I believe Attorney Regan just repeated that is that he was trying to find more capital for our project. That's how he left. And I sent him a text the morning of. The rain was pouring on our roof and I never -- and Tim sent him a text regarding this solution to his problem and he never responded.

THE COURT: Okay. Thank you.

MS. DIPIRO: Thank you, Your Honor.

THE COURT: All right. So I'll take this under advisement.

MS. DIPIRO: Thank you.

THE COURT: Thank you, all.

MR. REGAN: Thank you, Your Honor.

MR. SMITH: Thank you, Your Honor.

THE COURT: Okay.

(End at 11:13 a.m.)

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I certify that the foregoing is a true and accurate transcript from the digitally sound-recorded record of the proceedings.

4/4/2016

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